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No. 388

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

MARSHALL P. SAFIR ET AL., *Petitioners*

v.

ANDREW GIBSON ET AL., *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS AMERICAN EXPORT ISBRANDTSEN LINES, INC.; BLOOMFIELD STEAMSHIP CO.; LYKES BROS. STEAMSHIP COMPANY, INC.; MOORE-McCORMACK LINES, INCORPORATED; AND UNITED STATES LINES, INC.

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OPINIONS BELOW

The first opinion of the court of appeals (Pet. App. 70a)[1] is reported at 417 F. 2d 972; the court's two

[1] "Pet. App." refers to the Appendix to the petition for certiorari.

subsequent opinions (Pet. App. 7a and Pet. App. 1a) are unreported. The district court's first opinion (Pet. App. 79a) is reported at 297 F. Supp. 630; its second opinion (Pet. App. 19a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 26, 1970. Timely petitions for rehearing were denied on June 18, 1970. A petition for a writ of certiorari was filed on July 14, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

On the basis of a prior Federal Maritime Commission report that actions by certain steamship companies violated section 15 of the Shipping Act, 1916, the court of appeals ruled those actions contrary to section 810 of the Merchant Marine Act, 1936. In the opinion of these respondents, the question presented is whether the court correctly held that whether to invoke the sanctions authorized by section 810 respecting payment of subsidies for the period of violation is a matter in the discretion of the Maritime Subsidy Board.

STATUTE INVOLVED

Section 810 of the Merchant Marine Act, 1936, 49 Stat. 2015, 46 U.S.C. 1227, provides:

> It shall be unlawful for any contractor receiving an operating-differential subsidy under subchapter VI of this chapter or for any charterer of vessels under subchapter VII of this chapter to continue as a party to or to conform to any agreement with another carrier or carriers by

water, or to engage in any practice in concert with another carrier or carriers by water, which is unjustly discriminatory or unfair to any other citizen of the United States who operates a common carrier by water exclusively employing vessels registered under the laws of the United States on any established trade route from and to a United States port or ports.

No payment or subsidy of any kind shall be paid directly or indirectly out of funds of the United States or any agency of the United States to any contractor or charterer who shall violate this section. Any person who shall be injured in his business or property by reason of anything forbidden by this section may sue therefor in any district court of the United States in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of the suit, including a reasonable attorney's fee.

STATEMENT

Background

This case arises from activities during 11 months in 1965 and 1966 by some members of the Atlantic and Gulf American-Flag Berth Operators — commonly called AGAFBO — with respect to their rates for transportation of household goods and other military cargo between certain American and European ports. AGAFBO was a conference of steamship companies, established under an agreement approved in accordance with section 15 of the Shipping Act, 1916 (46 U.S.C. 814), and formed at the behest of the Military Sea Transportation Service for the purpose of negotiating rates for the ocean carriage of military cargo between the ports involved. Of the nineteen U.S.-flag

companies comprising AGAFBO, nine, including these respondents, had entered into operating-differential subsidy contracts with the Maritime Administration under Title VI of the Merchant Marine Act, 1936 (46 U.S.C. 1171 *et seq.*).

In March 1965 Sapphire Steamship Lines, Inc.—formed by petitioner Marshall P. Safir and Arnold Weissberger, its principal officers and stockholders—entered the trade in question. Sapphire declined an offer of membership in AGAFBO and filed a tariff with the Federal Maritime Commission containing rates significantly lower than the ones negotiated by AGAFBO with MSTS for that trade. AGAFBO protested to the FMC that Sapphire's rates were unreasonably low and uneconomic in violation of the Shipping Act and its tariff should therefore be rejected. The FMC, however, took no action. On March 25, 1965 AGAFBO notified MSTS that as a "temporary competitive measure" it was lowering its own rates to meet Sapphire's and filed an amended tariff to that effect with the FMC. These new rates remained effective until March 1, 1966. Shortly thereafter MSTS altered its procedures to procure ocean freight services through a system of competitive bidding rather than by negotiation, which resulted in some even lower rates for the cargo in question. Sapphire Steamship Lines, Inc., went out of business in March of 1967 and was adjudged bankrupt that May.

Investigation by the Federal Maritime Commission

In May, 1965, the Federal Maritime Commission on its own motion began an investigation into the practices surrounding the procurement of ocean transportation for military cargoes seeking to discover if

there had been any violations of the Shipping Act, 1916.[2] The FMC's "Report" of the results of its investigation, *Rates on U.S. Government Cargoes*, 11 F.M.C. 263 (December 8, 1967) (Pet. App. 22a) exonerated AGAFBO from any Shipping Act violations except with respect to lowering its rates to match Sapphire's.

The Report acknowledged that whether those matching rates violated the Shipping Act was "moot", those rates having expired nearly two years previous and in the interim MSTS having abandoned negotiated rates in favor of competitive bidding. 11 F.M.C. at 279 and 286. The mootness of the question notwithstanding, the Report went on to state that the rates were unreasonably low and noncompensatory and violated sections 15 and 18(b)(5) of the Shipping Act, 46 U.S.C., 814 and 817(b)(5). Even though the FMC based its conclusion that AGAFBO's matching rates were uneconomic entirely on public statements by AGAFBO officials protesting the low level of Sapphire's identical rates, the Report upheld Sapphire's rates as not violative of the Shipping Act. 11 F.M.C. at 280.

The issue of whether by matching Sapphire's rates subsidized AGAFBO members had violated section 810 of the Merchant Marine Act, 1936, 46 U.S.C. 1227, was not raised, decided or discussed in the FMC Report. Nor did it include any order or directive requiring action on the part of AGAFBO or its constituents respecting rates. Neither AGAFBO nor any of its members sought judicial review of that Report.

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[2] 39 Stat. 728, as amended, 46 U.S.C. 801 *et seq.*

The Preliminary Court Proceedings

While the Federal Maritime Commission, an independent administrative agency, administers the Shipping Act, 1916, implementation of the Merchant Marine Act, 1936,[3] is entrusted to the Maritime Administration and the Maritime Subsidy Board, Executive Branch agencies in the Department of Commerce.[4] Section 810 of the Merchant Marine Act[5] provides in pertinent part:

> It shall be unlawful for any contractor receiving an operating-differential subsidy under . . . this title . . . to continue as a party to or to conform to any agreement with another carrier or carriers by water, or to engage in any practice in concert with another carrier or carriers by water, which is unjustly discriminatory or unfair to any other citizen of the United States who operates a common carrier by water exclusively employing vessels registered under the laws of the United States on any established trade route from and to a United States port or ports.
>
> No payment or subsidy of any kind shall be paid directly or indirectly out of funds of the United States or any agency of the United States to any contractor or charterer who shall violate this section. * * *.[6]

Following the FMC Report, Sapphire's counsel wrote the Maritime Administrator and the Maritime

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[3] 39 Stat. 728, as amended, 46 U.S.C. 1101 *et seq.*

[4] See Reorganization Plan No. 7 of 1961, 75 Stat. 840.

[5] 46 U.S.C. 1227.

[6] Section 810 also affords a treble damage remedy to persons injured by violators of the section. A separate action invoking that remedy was filed on behalf of Sapphire Steamship Lines, Inc., which is not involved in this litigation (Civil Action No. 2130-66, D.D.C.). Settlement of that suit is pending. See note 8, *infra*, p. 11.

Subsidy Board invoking section 810 and demanding that all subsidy payments to the subsidized AGAFBO lines be terminated and that the Administrator and the Board commence legal action to recover all subsidies paid to those lines since March 29, 1965. When the Maritime officials did not accede to those demands, respondents Sapphire Steamship, Marshall P. Safir and Arnold Weissberger brought suit against them in the United States District Court for the Eastern District of New York to compel compliance. *Safir* v. *Gullick*, 297 F. Supp. 630 (1969) (Pet. App. 79a)

The district court dismissed the action for lack of standing to sue but the Second Circuit reversed, finding jurisdiction under 28 U.S.C. 1337 and holding that an injured competitor had standing to seek to invoke the subsidy cut-off and recovery sanctions of section 810. *Safir* v. *Gibson*, 417 F. 2d 972 (1969) (Pet. App. 70a). The court of appeals further ruled that the provision did not bar present subsidy payments to steamship companies which had ceased their violations, and the Maritime Administration had discretion to determine whether to seek recovery of past subsidies from former violators for the period of their violations. (Pet. App. 79a).

The Present Proceedings

Less than a month after that Second Circuit decision, the Maritime Subsidy Board commenced a formal hearing to "compile a public record which will provide a basis for recommending to the Maritime Subsidy Board whether Section 810, Merchant Marine Act, 1936, as amended (46 U.S.C. 1227), has been violated and the appropriate action that should be taken." (Pet. App. 68a) All the subsidized AGAFBO companies were made respondents in that proceeding,

together with Sapphire Steamship, Marshall Safir and Arnold Weissberger. (Pet. App. 68a-69a).

Sapphire and the other parties allied with it in interest refused to participate in that hearing. They moved in the district court for an order restraining the government from paying any further subsidies to members of AGAFBO and directing recovery of subsidies previously paid. That court denied the motion for an injunction in all respects, concluding that if the Board's action was "[e]xpeditiously pursued, it might well meet every need of the present situation and every legally recognized interest of the plaintiff." (Pet. App. 21a). In passing, the district court noted that the court of appeals had not previously found that "Section 810 had been violated, or that a finding of a violation of Section 15 is a finding of a violation of Section 810, and it did not indicate a finding that the AGAFBO members were 'current violators' of Section 810." (Pet. App. 21a).

Sapphire again appealed to the Second Circuit, which agreed with the trial court that the injunction to restrain the payment of current and future subsidies should be denied, observing that (Pet. App. 8a):

> Plaintiffs do not charge that the AGAFBO members now receiving subsidy payments are violating §810 or indeed that they have done so since March 1, 1966. The argument that these carriers will not have returned "to the path of virtue" until they have refunded all subsidy payments received during the period of violation is a far-fetched misreading of our decision.

The court of appeals also went on to decide that the FMC statement that AGAFBO violated section

15 of the Shipping Act constituted as a matter of law a determination in substance that at least some members of the conference had violated section 810 of the Merchant Marine Act, 1936, and directed the district court to instruct the Maritime Administration not to redetermine that issue. The court of appeals' decision left to the Maritime Administration the function of "investigating the nature and extent of the individual carriers' participation in the illegal action" and the discretion to determine "whether to seek recovery of subsidies paid during the violation and, if so, how much and from whom." (Pet. App. 17a).

At this juncture respondents and other subsidized AGAFBO steamship companies were granted leave to intervene in the court proceedings. These companies and the government all sought reconsideration of the aspect of the decision giving conclusive effect to an FMC finding made in a Shipping Act investigation on a Maritime Subsidy Board proceeding under section 810 of the Merchant Marine Act. On June 18, 1970 their petitions for rehearing or rehearing *en banc* were denied. (Pet. App. 1a, 5a.)

ARGUMENT

The court of appeals held that on the basis of an FMC report of past violations of section 15 of the Shipping Act, the Maritime Subsidy Board is not automatically compelled to invoke the sanctions of Merchant Maring Act section 810 respecting repayment of subsidy by the offending carriers, nor must the Board terminate current subsidies to such carriers because of past violations. On these issues the court's decision is correct and concededly not in conflict with

any other decisions. Further review in these circumstances is not warranted.

1. The court's construction of section 810 is consistent with the general purposes of the Merchant Marine Act. "Subsidies" under this Act are not unilateral grants from the government to the shiplines. Rather, they are payments under bilateral contracts between the Maritime Administration and individual shipping companies intended in principal part to enable the companies to use American citizen crews and still compete with foreign-flag lines using foreign crews at far lower wages. See *Pacific Far East Line, Inc.* v. *United States*, 394 F. 2d 990 (Ct. Cl. 1968) and S. Rep. No. 1721, 74th Cong., 2d Sess. (1936), pp. 6, 18. Under these government contracts, in exchange for financial aid the companies must provide specified regular U.S.-flag shipping services on trade routes selected as essential to American foreign commerce by the Maritime Administration. See section 601, 46 U.S.C. 1171, and *Pacific Far East Line, Inc.* v. *United States*, *supra*.

Acceptance of petitioners' view of section 810 would mean that a violation for a limited period on a single trade route—the case here—would forfeit a company's contractual rights to all subsidies on all its routes for an unspecified time. This result would follow without regard to the nature or extent of a company's participation in the violation, the actual effect of that violation on other carriers in the trade, and other remedies available to such carriers. Such a harsh result could cripple a company's ability to carry out its Merchant Marine Act commitments to the detriment of foreign commerce on important American trade routes. As the court noted (Pet. App. 77a), this could be fatal to the Act's primary purpose of fostering the American Merchant Marine for the bene-

fit of the general public." See Section 101 of the Act, 46 U.S.C. 1101.[7]

On the other hand, under the court's construction of section 810 the Board has discretion to decide whether, and if so how much, subsidy repayment is appropriate after investigation into the circumstances of the particular case—an investigation which is currently being undertaken by the Board in this matter. This reading of the provision retains the deterrent potential of the sanction without clashing with the overall purpose of the Act. Given the existence of the treble damage remedy provided expressly in section 810 to protect the interest of competing carriers —a remedy which Sapphire has also invoked[8]—the

[7] 46 U.S.C. 1101 provides: "It is necessary for the national defense and development of its foreign and domestic commerce that the United States shall have a merchant marine (a) sufficient to carry its domestic water-borne commerce and a substantial portion of the water-borne export and import foreign commerce of the United States and to provide shipping services on all routes essential for maintaining the flow of such domestic and foreign water-borne commerce at all times, (b) capable of serving as a naval and military auxiliary in time of war or national emergency, (c) owned and operated under the United States flag by citizens of the United States, insofar as may be practicable, and (d) composed of the best-equipped, safest, and most suitable types of vessels, constructed in the United States and manned with a trained and efficient citizen personnel. It is hereby declared to be the policy of the United States to foster the development and encourage the maintenance of such a merchant marine."

[8] Following the decision below, the AGAFBO companies (including these respondents) entered into an agreement with the Trustee in Bankruptcy for Sapphire Steamship Lines, Inc., for settlement of the treble damage suit against them. That settlement is subject to approval by the bankruptcy court and application for such approval is pending. *Smith, Trustee for Sapphire Steamship Lines, Inc. v. AGAFBO, et al.* (Civil Act. No. 2130-66, D.D.C.). The instant petition is not being prosecuted by the Trustee in Bankruptcy or his counsel.

court below was correct in declining to read into section 810 a mandatory sanction which would hinder rather than serve the primary purpose of the legislation.

2. With regard to rendering shipping companies ineligible for future subsidies (as distinct from repayment of funds already received), as the court below correctly observed, where Congress intended to make lines ineligible for future subsidies as a result of past conduct it so provided expressly in the Merchant Marine Act (Pet. App. 77a). See, *e.g.*, section 806(c), 46 U.S.C. 1228.[9]

3. The question presented in this case has not previously arisen in the more than 30 years that the statute has been on the books, nor do petitioners suggest any basis for concluding that the question is likely to recur with any greater frequency in the future. In these circumstances, the petition does not present an important issue of federal law meriting further review by this Court.

4. Finally, review at this stage would mean that the Court would be called upon to decide Merchant Marine Act questions without the views of the Maritime Subsidy Board, the agency entrusted with pri-

[9] 46 U.S.C. 1228 provides in pertinent part: "In addition to the punishment prescribed in section 1224 of this title, any person or corporation convicted of a misdemeanor under the provisions of this chapter shall be ineligible, at that discretion of the Federal Maritime Board or the Secretary of Commerce, to receive any [subsidy] benefits under sections 1151-1182 of this title, or to receive a charter under sections 1191-1204 of this title for a period of five years after conviction."

mary jurisdiction over that Act.[10] As we noted, the Board is standing by to resume a full investigation under section 810, previously commenced but held in abeyance pending the outcome of this litigation. See Pet. App. 68a. The Court's decisions teach that where Congress has created an administrative agency with expertise in a given area it is not appropriate for courts to pass on matters within the agency's ken before the agency itself has had a chance to act. *E.g.*, *Whitney Nat'l Bank* v. *Bank of New Orleans*, 379 U.S. 411, 420-421 (1965); *Federal Maritime Board* v. *Isbrandtsen Co.*, 356 U.S. 481, 498 (1958). Accordingly, review at this time would be premature. Here, as in *Macauley* v. *Waterman Steamship Corp.*, 327 U.S. 540, 545 (1946), "the administrative process, far from being exhausted, had hardly begun."

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[10] Primary responsibility for administration of the Act is vested in the Secretary of Commerce by *Reorganization Plan No. 7 of 1961*, 75 Stat. 840, and delegated by him to the Maritime Administration and Maritime Subsidy Board, 27 Fed. Reg. 3637 (1962). See *Pacific Far East Line, Inc.* v. *United States*, *supra*, 394 F.2d at 992, n. 1.

CONCLUSION

For the reasons stated the petition for certiorari should be denied.[11]

Respectfully submitted,

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September 11, 1970

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[11] We are firmly of the belief that review at this time is inappropriate. However, in the event the Court grants the petition, we urge that it also grant our conditional cross-petition for certiorari, filed concurrently with this brief in opposition *sub nom. American Export Lines, Inc. et al.* v. *Safir, et al.* For the reasons developed in that conditional cross-petition, other errors in the decision below must be considered before the Court reaches the points petitioners urge here. It is our basic position, however, that any review by the Court is inappropriate at this interlocutory stage of the proceeding. *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R. R.*, 389 U.S. 327 (1967).